No. 88-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ATLANTIC RICHFIELD COMPANY,
Petitioner,
v.
USA PETROLEUM COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUGHES HUBBARD & REED
OTIS PRATT PEARSALL
PHILIP H. CURTIS
One Wall Street
New York, New York 10005

FRANCIS X. MCCORMACK
DONALD A. BRIGHT
EDWARD E. CLARK
RICHARD C. MORSE
PAUL J. RICHMOND
Atlantic Richfield Company
515 South Flower Street
Los Angeles, California 90071

HUGHES HUBBARD & REED
RONALD C. REDCAY
(Counsel of Record)
MATTHEW T. HEARTNEY
JAMES F. SPEYER
555 South Flower Street
Los Angeles, California 90071
(213) 489-5140
Attorneys for Petitioner Atlantic Richfield Company

90 pp

QUESTION PRESENTED

The Ninth Circuit's decision presents the following fundamental question concerning this Court's antitrust injury requirement limiting the type of loss for which a private plaintiff may bring an antitrust action:

> Whether a competitor's profits and sales lost as a result of nonpredatory prices imposed by a manufacturer on its retailers through vertical maximum price fixing amount to antitrust injury necessary for the competitor to bring a private antitrust action.

The Ninth Circuit panel, which divided two to one, admitted that this antitrust injury issue was a "difficult" one on which its decision directly conflicted with a prior Seventh Circuit decision.* A subsequent Seventh Circuit decision acknowledged the conflict within the Circuits that the Ninth Circuit decision in this case had created and stated that the Ninth Circuit rule "stand[s] the antitrust injury inquiry on its head."**

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* *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

** *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 n.6 (7th Cir. 1989).

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Petitioner Atlantic Richfield Company ("ARCO") respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Ninth Circuit filed on October 7, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 859 F.2d 687 and appears as Appendix A to this Petition. The District Court's unreported ruling granting ARCO summary judgment dismissing plaintiff's Sherman Act § 1 claim appears as Appendix B to this Petition.

JURISDICTION

The Court of Appeals entered its judgment in this case on October 7, 1988. The Court of Appeals denied a timely

petition for rehearing and suggestion for rehearing *en banc* on January 10, 1989. (Appendix C hereto.) This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

STATEMENT OF THE CASE

The Ninth Circuit decision here would resuscitate the efforts of USA Petroleum Company ("USA Petroleum") to recover in the courts through a Sherman Act lawsuit the sales and profits it lost to increased competition in the marketplace from low retail prices for ARCO-brand gasoline.

The Competition Between USA and ARCO Brands of Gasoline

ARCO is an integrated oil company which, among other things, refines and markets gasoline throughout the western United States. ARCO markets gasoline to consumers directly through its own gasoline stations and indirectly through independently owned ARCO-brand dealers.

USA Petroleum puchases gasoline from refiners for sale at its USA-brand stations. Some of these USA-brand stations compete with ARCO-brand stations in the market for sales of gasoline to consumers.

The Increased Price Competition From ARCO-Brand Gasoline

This lawsuit arose as a result of ARCO's highly successful marketing program instituted in April 1982 pursuant to which ARCO discontinued its credit card and otherwise acted to lower its costs of refining and selling gasoline. Those cost-cutting measures enabled ARCO to lower the retail prices for gasoline sold at its own stations and more importantly here to lower the wholesale prices to independently owned ARCO-brand gasoline dealers. These ARCO-brand dealers, in turn, lowered their retail prices to consumers.

Some of the ARCO-brand stations that lowered their prices competed directly with USA-brand stations for sales to consumers. USA alleges that the lower prices at such ARCO-brand stations in California and Washington caused the competing USA-brand stations either to reduce their prices or to lose sales to ARCO stations.

As a result of its marketing program, the ARCO-brand share of the retail gasoline market in California and Washington increased from approximately 10% to 12% in 1981 to approximately 14% to 16% in 1983. (SR 79:193.) As the District Court found (in findings not challenged on appeal), the ARCO-brand share of that market never exceeded 17% during any relevant period. App. B, ¶ 3. As the District Court also found, this market share is clearly

insufficient for ARCO to exercise market power over retail gasoline prices. *Id.* at ¶¶ 3, 4.

USA Petroleum's Lawsuit

In May 1983, USA Petroleum commenced this lawsuit challenging ARCO's marketing program. It sought both injunctive relief and treble damages measured by the sales and profits allegedly lost at USA stations as a result of competition from the low retail prices at the competing ARCO-brand stations. USA Petroleum sued only ARCO, and not any ARCO-brand dealers.

USA Petroleum's Complaint asserted a host of federal and state law claims. Its essence, however, was a claim that ARCO had attempted to monopolize the retail gasoline market by engaging in predatory pricing, in violation of Sherman Act § 2. The Complaint also alleged that ARCO had engaged in vertical maximum price fixing with its dealers in violation of Sherman Act § 1.

The District Court dismissed the original Sherman Act § 2 claim because the Complaint alleged facts showing that ARCO could not successfully monopolize the market. *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F. Supp. 1296, 1304 (C.D. Cal. 1983). USA Petroleum amended its complaint to allege that ARCO was attempting to monopolize the "discount segment of the gasoline market," which it alleged constituted a separate and distinct market for antitrust purposes. The District Court, while highly skeptical that the claim could succeed when put to a factual test, felt compelled not to dismiss the amended Sherman Act § 2 claim at the pleading stage. (CR 54.) Accordingly, the attempted monopolization case proceeded, putting ARCO to the burden of exhaustive document discovery.

ARCO's Summary Judgment

At the conclusion of document discovery, ARCO moved for summary judgment dismissing the Sherman Act §§ 1 and 2 claims. The motion was based upon an extensive factual record showing that ARCO and the other sellers of ARCO-brand gasoline, individually or collectively, posed no real threat of acquiring monopoly power in any relevant market: There are simply too many competitors in the gasoline market, and ARCO gasoline has far too small a share of that market, for ARCO (and its dealers) ever to obtain the power to charge supracompetitive prices. This lack of market power, actual or threatened, precluded USA Petroleum from establishing one of the substantive elements of a Sherman Act § 2 claim — dangerous probability of monopolization — and therefore required dismissal of that claim. It similarly precluded USA Petroleum from establishing that the challenged ARCO-brand prices were predatory and thereby from satisfying the antitrust injury requirement imposed by Clayton Act § 4 as a condition for a private action based upon the Sherman Act, even assuming *arguendo* that USA Petroleum could prove price fixing.

Confronted by ARCO's motion, USA Petroleum promptly stipulated to dismiss with prejudice its Sherman Act § 2 claim. USA Petroleum admitted that ARCO could not monopolize the retail gasoline market. USA Petroleum, however, asserted that its § 1 claim permitted it to recover all the damages sought by its § 2 claim, but without the need to make any showing that its injuries as a competitor reflected or flowed from injury to competition in a relevant market.

The District Court granted ARCO summary judgment dismissing the § 1 claim. In granting summary judgment, the District Court assumed that USA Petroleum could

prove that ARCO violated Sherman Act § 1 and that USA Petroleum had lost profits and sales as a result of having had to compete against the lower fixed prices at ARCO-brand stations. The District Court held that USA Petroleum's lost profits and sales did not constitute antitrust injury, required by Clayton Act § 4 in a private damage action, in which the plaintiff must establish not only the defendant's violation but also its liability to the specific private plaintiff bringing the action.

The District Court directed the entry of judgment on the Sherman Act § 1 claim pursuant to Fed R. Civ. P. 54(b) so that USA Petroleum could appeal this determinative issue of law. The parties agreed to stay the remainder of the action pending disposition of the appeal.

The Ninth Circuit Decision

A panel of the Ninth Circuit, dividing two to one, reversed the District Court's summary judgment and remanded the § 1 claim for trial.

The majority opinion stated that the antitrust injury issue was a "difficult question" and one of "first impression" within the Ninth Circuit. It also recognized that the Seventh Circuit previously had decided the very same issue in *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (*"Jack Walters"*). However, the majority refused to follow the Seventh Circuit rule that a plaintiff suffers antitrust injury only when its competitor's prices set by vertical maximum price fixing are predatory. Instead, it in essence held that a competitor establishes antitrust injury simply by showing that its injuries were caused in fact by the lower prices resulting from vertical maximum price fixing because such price fixing is *per se* illegal. 859 F.2d at 697.

The dissent disagreed. It read this Court's controlling case law on antitrust injury to require an antitrust plaintiff to establish more than cause-in-fact — specifically, to establish that the plaintiff's "alleged injury results from the *anticompetitive* aspects of" the violation — even where the violation is *per se* illegal. 859 F.2d at 701. And, the dissent found that USA Petroleum could not establish antitrust injury here because of the unchallenged District Court finding that the fixed prices were not predatory. *See id.* at 703-705.

ARCO filed a petition for rehearing and suggestion that the rehearing be *en banc* because of the conceded conflict with the Seventh Circuit. During the pendency of that petition, the Seventh Circuit in a unanimous opinion by the Chief Judge reaffirmed its antitrust injury rule limiting competitor suits to predatory vertical maximum price fixing. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989). That opinion stated that the Ninth Circuit decision, by reducing the antitrust injury requirement to a mere cause-in-fact test for *per se* violations of the Sherman Act, stood "the antitrust injury inquiry on its head." 864 F.2d at 1419 n.6. Four days later, the Ninth Circuit panel denied ARCO's petition for a rehearing. App. C.

REASONS FOR GRANTING THE WRIT

The direct conflict which both the Seventh and Ninth Circuits concede exists on this important issue of antitrust law cries out for resolution by this Court. The Court should resolve the conflict by granting certiorari and reversing the Ninth Circuit.

The Court should review the Ninth Circuit rule because it creates a new antitrust cause of action which, rather than furthering the objectives of antitrust law, could be

used by competitors to stifle competition. The novelty of the cause of action is amply demonstrated by the absence of even one prior reported opinion permitting a competitor to sue for profits lost as a result of vertical maximum price fixing. The hundreds of published opinions involving vertical maximum price fixing were brought by dealers who succumbed to their supplier's price coercion or who were terminated because they refused to succumb. The Ninth Circuit would create additional cases brought by a whole new class of plaintiffs. These competitor cases not only would further burden the federal courts, but they also would run counter to policies underlying this Court's most recent decisions imposing limitations on the classes of private plaintiffs who can sue for antitrust violations.

The Ninth Circuit rule directly impacts the policy barring private antitrust actions "inimical to the purposes of" the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Maximum vertical price fixing by definition results in immediately lower prices to consumers. The lower prices reflect correspondingly smaller profits to the participants in the price fixing and to their competitors who reduce prices to meet the increased competition. Where the lower prices are not predatory — *i.e.*, where they will not lead to market power that will enable supracompetitive prices in the future — these losses represent gains to consumers that will never be offset. The allowance of private antitrust actions to recover these competitor losses denies consumers lower prices in order to compensate competitors for lost profits. By preventing lower nonpredatory prices such actions are "inimical" to consumer welfare, which this Court has identified as the overriding purpose of the Sherman Act. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.' "). And, by doing so to compensate competitors they improperly elevate the protection of competitors over the protection of competition. *See Brunswick*, 429 U.S. at 488.

Moreover, the allowance of such competitor antitrust actions could deprive consumers of lower prices in many cases which do not even involve vertical price fixing. Thus, as is the case here (*see* p. 26 n. 9 below), competitors will attempt to prove vertical maximum price fixing with evidence that a manufacturer granted its dealers discounts or lower prices and suggested that the dealers pass along the lower price in order to increase their sales volume. Such conduct is the essence of interbrand competition and is unquestionably beneficial to consumers. The existence of competitor treble damage actions in which that precise conduct may be used as evidence of price fixing, however, will cast a chill upon this vigorous competition. Manufacturers whose products reach consumers through dealers will hesitate to embark on programs to reduce prices to consumers, such as ARCO's here and that involved in the *Indiana Grocery* case. The result will be to deprive consumers of lower prices and to erect a price umbrella benefitting inefficient competitors.

In a series of recent opinions, this Court has warned against allowing antitrust actions that likely could cause suppliers "to forgo legitimate and competitively useful conduct rather than risk treble damages . . . ." *Business Electronics Corp. v. Sharp Electronics Corp.*, ___ U.S. ___, 108 S.Ct. 1515, 1521 (1988) ("*Sharp*"); *see Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 n. 17 (1986) ("*Cargill*"); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594-95 (1986) ("*Matsushita*"); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984) ("*Monsanto*"). These and other decisions of this Court confirm the correctness of the Seventh

Circuit's decision not to create in competitors a new cause of action for vertical maximum price fixing. As demonstrated below, the Ninth Circuit's contrary decision is based upon a misreading of this Court's opinions on antitrust injury and on vertical maximum price fixing. The Court should resolve the conflict by reaffirming the principles underlying its prior opinions and adopting the Seventh Circuit's rule.

I.

A COMPETITOR'S LOSSES FROM NONPREDATORY PRICES SET BY VERTICAL MAXIMUM PRICE FIXING ARE NOT ANTITRUST INJURY

Antitrust injury requires a careful analysis of the relationship between the specific injury suffered by the plaintiff and the reasons why the defendant's conduct causing that injury violates the antitrust laws. This Court's antitrust injury opinions from *Brunswick* through *Cargill* make clear that a private antitrust plaintiff can sue only when the nature of its injury reflects the anticompetitive effects that make the conduct unlawful.

The Ninth Circuit majority opinion, however, eschewed this careful analysis. Rather than examining the specific nature of the injury suffered by USA Petroleum, the majority focused on the generalized "disruption of competition in the plaintiff's market caused by the defendant's antitrust violation." 859 F.2d at 693. Moreover, the majority in essence found that such disruption exists as a matter of law whenever the conduct is *per se* illegal. And, rather than examining the anticompetitive effects underlying the *per se* illegality of vertical maximum price fixing, the majority focused on "the injury done to the market and to competitors by price-fixing" in general. *Id.* at 697. Having misapplied both elements of the analysis, the

majority in effect converted the antitrust injury inquiry into nothing more than a cause-in-fact test.

As the dissent in the Ninth Circuit and the Seventh Circuit in *Indiana Grocery* recognized, the majority thereby confused the antitrust injury requirement imposed by Clayton Act § 4 with the substantive requirements of a Sherman Act § 1 violation. While the latter focuses on competitive conditions in the market as a whole, the former focuses on the type of injury claimed by a particular plaintiff. As demonstrated below, the correct analysis shows that a competitor's losses from vertical maximum price fixing are not antitrust injury.

A. A Plaintiff Suffers Antitrust Injury Only Where Its Injuries Reflect The Anticompetitive Effects That Make The Defendant's Conduct Unlawful

This Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (*"Brunswick"*), held that a plaintiff under Clayton Act § 4 must:

> "prove *antitrust* injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."

The plaintiffs in *Brunswick* had won a jury verdict of $2,358,000 (before trebling), representing profits they would have earned if competing bowling alleys acquired by defendant through acquisitions assumed to violate Clayton Act § 7 had instead been allowed to go out of business, as those alleys would have done but for the assumed illegal merger. The Court held that the mere showing that plaintiffs' injury had been caused in fact by an antitrust violation did not satisfy Clayton Act § 4. *Id.*

The Court held that the plaintiffs also had to show that their injury reflected the "reason the merger was condemned" under the antitrust laws. 429 U.S. at 487. The merger would be illegal, as it was assumed to be for purposes of the appeal, because it created a deep pocket competitor that could have engaged in predatory conduct. *Id.* The plaintiffs' losses, however, resulted simply from continued competition from these centers that otherwise would have gone out of business, and not from any predatory conduct. The Court refused to allow an antitrust recovery in these circumstances because it would "divorce[] antitrust recovery from the purposes of the antitrust laws," would allow recovery for all dislocations caused by an antitrust violation "regardless of whether those dislocations have anything to do with the reason the [conduct illegal under the antitrust laws] was condemned" and "would authorize damages for losses which are of no concern to the antitrust laws." *Id.* (footnote omitted). The Court further noted that the plaintiffs, in effect, were complaining of injury caused by increased (but nonpredatory) competition. Allowing recovery for such injuries would be "inimical to the purposes of these [antitrust] laws," because "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*' . . . ." *Id.*

By relating the private remedies for an antitrust violation to the reasons why the conduct is unlawful, the Court announced a limitation akin to the common law rule barring recovery for injuries different from those which a statute was designed to prevent.[1] *See Jack Walters,* 737 F.2d at 708-09 (*Brunswick* represents "the application to antitrust law" of this tort doctrine).

[1]In one of the early cases in which this doctrine was established, *Gorris v. Scott,* 9 L.R.-Ex. 125 (1874), the court held that a shipper could not recover damages for sheep lost overboard while in the care of the defendant shipowner despite the defendant's violation of an Act of Parliament requiring that animals being shipped be held in pens. The court did so because the Act had been passed to keep the animals from contaminating each other, not to keep them from being swept overboard. While the lack of pens was a "but for" cause of the loss of the sheep, that loss did not reflect the policies underlying the Act and thus was not compensable.

The *Brunswick* opinion in this respect anticipated the Court's statement in *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 533 (1983), that Congress "assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation." (Footnote omitted.) The antitrust injury requirement, moreover, serves important, modern-day antitrust policies. Even conduct *per se* unlawful under the antitrust laws can have both procompetitive and anticompetitive aspects. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 50 n.16 (1977). By limiting the class of antitrust plaintiffs to those that suffer from the anticompetitive aspects of the unlawful conduct, the antitrust injury requirement prevents recoveries that at best are fortuitous and may even be anticompetitive.[2]

This exposition of the requirement's theoretical underpinnings demonstrates the error of the Ninth Circuit majority's conclusion that antitrust injury in essence

[2]Commentators have expressed the purpose of the antitrust injury requirement in similar terms. *See, e.g.,* Page, *The Scope of Liability for Antitrust Violations,* 37 Stan. L. Rev. 1445, 1461 (1985) ("The requirement of antitrust injury — that compensable harm be attributable to the anticompetitive aspect of a practice — thus serves to keep the size of the damage award related to the basis of substantive liability.")

equates to cause-in-fact for *per se* violations. The *per se* label is irrelevant to the antitrust injury issue because it serves only to establish that the challenged conduct has caused *some* anticompetitive effect in the market justifying *per se* illegality whereas antitrust injury focuses on the *precise injury* claimed by the *specific plaintiff*. *Indiana Grocery*, 864 F.2d at 1419 ("While sections 1 and 2 of the Sherman Act focus on competitive conditions in the market as a whole . . . section 4 of the Clayton Act focuses on the *type* of injury claimed by a *particular* plaintiff and demands that it be 'antitrust injury.'") (Citation and footnote omitted). Where the plaintiff's injury does not reflect the anticompetitive effects that make the conduct *per se* illegal it is improper to presume antitrust injury from *per se* illegality.[3] As demonstrated below, such is the case here.

B. A Competitor's Losses Do Not Reflect The Anticompetitive Effect That Makes Vertical Maximum Price Fixing Per Se Illegal

The Court twice has held that vertical maximum price fixing is *per se* illegal. *Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). Those holdings have engendered much debate, which has focused both on the "maximum" and the "vertical" aspects of the price fixing.[4]

[3]In addition to the Ninth Circuit, the Fourth Circuit also has confused "antitrust injury" with *per se* illegality. *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1303 (4th Cir. 1979) ("[T]he rationale of *Brunswick* . . . may not be as readily applicable in cases which . . . charge *per se* violations of the Sherman Act") (footnote omitted).

[4]Examples of scholarly criticism of the *per se* illegality of such price fixing include Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886 (1981); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, II*, 75 Yale L. J. 373 (1966).

Justice Harlan started the debate on the *maximum* aspect by arguing in his dissent in *Albrecht* that the vastly different economic effects of the two types of price fixing require that maximum price fixing be evaluated "on its merits, and not by incantation of a *per se* rule developed for an altogether different situation." 390 U.S. at 159. After this Court's landmark opinion in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the debate broadened to the appropriateness of *per se* treatment for any *vertical* price fixing, maximum or minimum. *Sylvania*, 433 U.S. at 70 (White, J., concurring) (the "effect . . . of the Court's opinion is necessarily to call into question" the *per se* rule against resale price maintenance). The Court, however, need not now review the correctness of those opinions holding maximum vertical price fixing *per se* illegal, because the Ninth Circuit "antitrust injury" decision is incorrect even under *Albrecht* and *Kiefer-Stewart*.[5]

[5]ARCO has not challenged the *per se* treatment of vertical maximum price fixing, because such a challenge was unnecessary to prevail on the antitrust injury issue and because this Court's opinions foreclosed such a challenge. The Court, unlike the District and Circuit Courts, can decide this issue if it believes that it now is necessary and appropriate to reverse its decisions that vertical maximum price fixing is *per se* illegal. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) (Court may consider questions not specifically passed upon by lower court or submitted as a question presented in petition for certiorari); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (Court may consider important questions "not raised or resolved" in lower court in cases coming from federal courts).

The Court in *Kiefer-Stewart* identified the following single reason for holding vertical maximum price fixing *per se* illegal:

> "[S]uch agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

340 U.S. at 213. The Court in *Albrecht* quoted this language as the reason to "adhere" to the *Kiefer-Stewart* rule. 390 U.S. at 152. The *Albrecht* Court also expressed the same policy protecting dealers from price coercion by their suppliers with the following additional language:

> "[S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of *buyers* to compete and survive in that market. . . . Maximum prices may be fixed too low for the *dealer* to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price-fixing may channel distribution through a few large or specifically advantaged *dealers* who otherwise would be subject to significant nonprice competition."

390 U.S at 152-53 (emphasis added).[6]

[6]The *Albrecht* Court mentioned only one other policy justifying the *per se* rule: where the actual price is almost always the maximum price "the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." 390 U.S. at 153. USA Petroleum cannot contend that its injuries reflect the anticompetitive effects of a minimum price-fixing conspiracy, because a conspiracy imposing a floor on ARCO-brand prices would serve only to benefit it as a competitor. *Matsushita*, 475 U.S. at 583.

Both opinions, therefore, based their holdings on the adverse effects on the defendants' coerced dealers. In both cases, the plaintiffs were dealers (present or former) of the defendants and the challenged conspiracies had as their purpose "to force [plaintiffs] to conform to" the defendants' prices. 390 U.S. at 149. Numerous opinions from the Courts of Appeal, including the Ninth Circuit, have recognized that the *per se* treatment for vertical price fixing is based upon the dealer's loss of "the freedom to set prices in accordance with his own judgment." *See, e.g., Chisolm Bros. Farm Equipment Co. v. Int'l Harvester Co.*, 498 F.2d 1137, 1142 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

The dealer who is coerced to fix his prices suffers antitrust injury because his injury reflects the proscribed anticompetitive effect. *See, e.g., General Cinema Corp. v. Buena Vista Distribution Co.*, 681 F.2d 594, 596 (9th Cir. 1982) (dealer can recover damages resulting from loss of " 'price making autonomy' "). Indeed, the dealer alone suffers antitrust injury in a vertical maximum price fixing conspiracy, because it is the dealer's loss of pricing discretion (when he succumbs to his manufacturer's price coercion) that separates lawful price suggestion from unlawful vertical price fixing.[7] *See Bender v. Southland Corp.*, 749 F.2d 1205, 1212 & n.4 (6th Cir. 1984) ("Establishing a *per se* violation of the Sherman Act in a private action brought under a vertical price fixing theory requires proof [that] the defendant . . . coerced the plaintiff into charging higher or lower prices"; *Albrecht* "supports

[7]Consumers suffer no antitrust injury because they benefit from the low prices resulting from nonpredatory *maximum* vertical price fixing.

the notion that coercion must be demonstrated in a private action brought under a vertical price fixing theory"); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1357 n.4 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972) (both holding that a supplier may suggest retail prices to its dealers and use "persuasion" to have those prices adopted, but may not coerce the dealer), *cert. denied*, 412 U.S. 493 (1973).

A competitor of the dealer does not suffer antitrust injury, because the antitrust rules are not designed to prevent the injury the competitor suffers as a result of having had to compete against the dealer's depressed prices unless, as discussed below, the prices are predatory. This is true at the most basic level because neither *Kiefer-Stewart* nor *Albrecht* cites as a reason for prohibiting vertical maximum price fixing a policy of protecting the coerced dealer's competitors. 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 346, at 250 & n.30 (1978) ("[T]he protection of the defendant's rivals is not the reason for prohibiting maximum resale maintenance [fn.: "This was not one of the grounds for the condemnation stated in the *Albrecht* case . . . . "]). Accordingly, the Ninth Circuit's decision here allowing private antitrust actions based upon such injuries, like the Third Circuit decision reversed in *Brunswick*, "divorces antitrust recovery from the purposes of the antitrust laws" and "would authorize damages for losses which are of no concern to the antitrust laws." *Brunswick*, 429 U.S. at 487.

Similarly as in *Brunswick*, USA Petroleum has not suffered antitrust injury because even in those circumstances (if any) where it proves successful price *coercion* of ARCO dealers it "would have suffered the identical 'loss' — but no compensable injury — " from low prices

that resulted simply from ARCO's lawful granting of discounts combined with successful *persuasion* of its dealers to lower prices. *Brunswick*, 429 U.S. at 487. USA concedes that the gravamen of its complaint is that ARCO subsidized through lower wholesale prices a "price-war" that the ARCO dealers otherwise "could not charge absent ARCO's subsidy." *See, e.g.*, USA Petroleum's Reply Brief in the Ninth Circuit, at 1. USA Petroleum's lost profits and sales resulted from the "subsidized" lower prices at competing ARCO stations. This loss was the same whether the ARCO dealer freely lowered his price as a result of ARCO's lower wholesale price to him or lowered his price only because he was coerced by ARCO. However, ARCO's actions violated Sherman Act § 1 (if at all) only where ARCO's efforts crossed the line that separates lawful suggestion and persuasion from unlawful coercion. Under this Court's existing law, a finding that ARCO crossed that line and "cripple[d] the freedom of [its dealers] and restrain[ed] their ability to sell in accordance with their own judgment" (*see Kiefer-Stewart*, 340 U.S. at 213) would entitle the dealers to sue to recover their injuries reflecting that restraint. However, USA Petroleum's injuries bear no relationship to the restraint, because they flow from the lawful "subsidy" and the resulting low retail prices and not from the coercion. Accordingly, as in *Brunswick*, they are "not of 'the type that the statute was intended to forestall' . . . " and therefore are not antitrust injury. 429 U.S. at 487-88.

Finally as in *Brunswick*, USA Petroleum's injuries resulted from increased competition, here represented by lower prices to consumers of gasoline. In *Cargill*, the Court reaffirmed, and extended to injunction actions under Clayton Act § 16, the holding in *Brunswick* that a plaintiff cannot prove antitrust injury where its damages result from increased competition brought about by an

antitrust violation, absent proof of predatory pricing. The Court there held that "a showing of loss or damage due merely to increased competition does not constitute" antitrust injury. 479 U.S. at 122.

Both *Brunswick* and *Cargill* involved mergers assumed to violate Clayton Act § 7. However, the antitrust injury requirement is based upon Clayton Act § 4, which applies to private actions for violation of any antitrust law. And, the Court's reasons for requiring predatory prices in those cases apply as well to any competitor antitrust action. Professors Areeda and Hovenkamp have acknowledged that the same principles apply as well to *per se* violations of the Sherman Act:

> "For example, imagine that physicians agree on their maximum prices, which the Supreme Court has condemned as *per se* unlawful because it tampers with the market or may be a disguised minimum. In addition, a maximum price fix can limit the provisions of services consumers desire. But suppose that a rival physician attacks the price- fixers and proves that he lost patients who shifted their patronage solely because the defendant physicians offered lower prices. Such injury-in-fact proximately caused by the illegal price fix is not antitrust injury, because protecting high price suppliers against lower priced competition desired by consumers is not an injury that the antitrust laws are designed to prevent, nor does it flow from the rationale for condemning maximum price fixing."

P. Areeda & H. Hovenkamp, *Antitrust Law* § 334.2c, at 305 (Supp. 1988). Indeed, Professors Areeda and Turner explicitly recognized that competitors do not suffer antitrust injury as a result of nonpredatory vertical maximum price fixing. 2 P. Areeda & D. Turner, *Antitrust Law* § 346,

at 249-50 (1978). As discussed below, the Seventh Circuit has reached the same conclusion.

II.

THE NINTH CIRCUIT DECISION HAS CREATED A CONFLICT BETWEEN THE CIRCUITS WHICH THIS COURT SHOULD RESOLVE BY HOLDING THAT A COMPETITOR'S LOSSES FROM VERTICAL MAXIMUM PRICE FIXING ARE NOT ANTITRUST INJURY

A. A Direct Conflict Exists Between The Circuits

For the reasons demonstrated above, the Seventh Circuit twice has held that a competitor's losses from vertical maximum price fixing do not amount to antitrust injury.

The first such opinion was *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984). Jack Walters was a building materials dealer who, along with other dealers, sold the defendant's prefabricated buildings. Jack Walters alleged that the defendant coerced its dealers to set lower prices for its buildings in violation of Sherman Act § 1 and that these lower prices injured Jack Walters, as a competitor of the coerced dealers. The court in an opinion by Judge Posner held that:

> "Even if what Morton did was price fixing, Walters could not challenge it. A private plaintiff can complain only of an antitrust injury. *Brunswick*. . . "
>
> ". . . In the present case, even if Morton did violate the prohibition against fixing its dealers' prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no

> suggestion that the lower prices would have been below cost; they would have been lawful prices.... [T]he loss to Walters from lawful price competition was a gain to consumers. *Walters will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust violation.*"

737 F.2d at 708-09 (emphasis added).

In *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989), the Seventh Circuit applied the *Jack Walters* rule in a case indistinguishable in any pertinent respect from that presented here. Indiana Grocery operated 28 supermarkets in the Indianapolis area. Super Valu Stores, a wholesale and retail seller of groceries, granted one of its "Cub" franchise discount grocery stores to a competitor of Indiana Grocery. Price cutting by this Cub franchisee, subsidized by low wholesale prices from Super Valu, started a retail price war that allegedly cost Indiana Grocery profits and sales. Indiana Grocery brought an action under Sherman Act §§ 1 and 2, alleging respectively price-fixing and an attempt to monopolize. However, after conceding that the Cub franchisee's prices were not predatory, Indiana Grocery voluntarily dismissed its § 2 claim against Super Valu. The District Court then dismissed the § 1 claim on summary judgment on the ground that Indiana Grocery's lost profits and sales resulting from its competitor's nonpredatory prices set by vertical maximum price fixing did not constitute antitrust injury. 684 F. Supp. 561 (S.D. Ind. 1988). The Seventh Circuit affirmed, citing *Brunswick, Matsushita, Cargill* and *Jack Walters.* It specifically rejected the argument, "which in essence was recently accepted by [the] Ninth Circuit panel majority in" this

case, that antitrust injury can be presumed in a *per se* case from causation-in-fact. 864 F.2d at 1418. The Seventh Circuit characterized the Ninth Circuit majority's approach in this case as "stand[ing] the antitrust injury inquiry on its head." *Id.* at 1419 n.6.

The facts and procedural history of *Indiana Grocery* and this case are identical in all pertinent respects, except for the results in the Courts of Appeal. Without action by this Court, ARCO faces antitrust liability in a suit by its dealers' competitor for vertical maximum price fixing, while Super Valu does not. This difference results simply from the geographic location of the alleged price fixing, a fortuity which should not play such a determinative role in our national antitrust enforcement scheme. Moreover, as discussed more fully below, this difference has significance far beyond the impacts on the parties to these particular lawsuits.

B. The Ninth Circuit Rule Is Inconsistent With The Principal Purpose Of The Antitrust Laws, Which Is To Benefit Consumers

The Ninth Circuit rule does not create a new antitrust cause of action to which antitrust policy is simply indifferent. It creates a cause of action that is contrary to the fundamental purposes of the antitrust laws. The Court, therefore, should not allow the conflict to endure (and potentially to spread) but should promptly undo the Ninth Circuit rule.

The Court has recognized that consumers, not competitors, are the principal intended beneficiaries of the antitrust laws. In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), the Court quoted with approval Judge (then Professor) Bork's description of the Sherman Act as a "consumer welfare prescription." *See* R. Bork, *The Anti-*

trust Paradox 66 (1978). In *Brunswick,* the Court reaffirmed that the antitrust laws "were enacted for 'the protection of *competition,* not *competitors'* . . . ." 429 U.S. at 488, *quoting Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). The Court recently has described interbrand competition, because it results in lower prices to consumers, as "the primary concern of the antitrust laws. . . ." *Sharp,* ___ U.S. ___, 108 S.Ct. 1515, 1521.

Following this Court's lead, the Courts of Appeal have identified consumer welfare as the principal objective of the antitrust laws.[8] Most significantly here, the courts have recognized the significance of consumer welfare to the antitrust injury inquiry. The Third Circuit in *Alberta Gas Chemicals,* 826 F.2d at 1241, stated the principle succinctly:

> "Mindful that antitrust law aims to protect competition, not competitors, we must analyze the antitrust injury question from the viewpoint of the consumer . . . ."

[8]*See, e.g., Monahan's Marine, Inc. v. Boston Whaler, Inc.,* 866 F.2d 525, 527 (1st Cir. 1989) ("The Sherman Act's very purpose is to help consumers, in part by bringing about low, nonpredatory prices"); *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours and Co.,* 826 F.2d 1235, 1239 (3rd Cir. 1987) ("Conduct that harms competitors may benefit consumers — a result the antitrust laws were not intended to penalize"), *cert. denied,* ___U.S. ___, 108 S. Ct. 2830 (1986); *Brunswick Corp. v. Riegel Textile Corp.,* 752 F.2d 261, 266 (7th Cir. 1984) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process — which means . . . to discourage practices that make it hard for consumers to buy at competitive prices — rather than to promote the welfare of particular competitors"), *cert. denied,* 477 U.S. 1018 (1985); *Murphy Tugboat Co. v. Crowley,* 658 F.2d 1256, 1259 (9th Cir. 1981) (the antitrust laws "do not prohibit non-predatory conduct that results in a lower price to consumers. The antitrust laws do not require the erection of a price umbrella for the benefit of inefficient competitors"), *cert. denied,* 455 U.S. 1018 (1982).

The Seventh Circuit in *Ball Memorial Hospital, Inc. v. Mutual Hospitol Insurance, Inc.,* 784 F.2d 1325, 1334 (7th Cir. 1986), stated it more powerfully:

> "Whenever the plaintiff and consumers have divergent rather than congruent interests, there is a potential problem in finding 'antitrust injury.' . . . When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust."

Nonetheless, the Ninth Circuit here created an antitrust cause of action the intended effect of which is to raise prices to consumers in order to redress and prevent injuries to a competitor. And, it did so in the face of unchallenged findings by the District Court that there is no probability of ARCO obtaining the market power necessary to raise prices in the future to supracompetitive levels. The Ninth Circuit's purported justification was to give competitors an ' "even playing field." ' 859 F.2d at 697. The Ninth Circuit thereby put the interests of competitors in higher profits ahead of the consumer interest in low prices. This decision totally ignored the recent guideposts of this Court and the Courts of Appeal.

This new category of private antitrust action threatens the consumer interest in low prices in another respect. The Court repeatedly has warned against the dangers inherent in antitrust actions based upon a competitor's low prices. For example, in *Matsushita,* 475 U.S. at 594, the Court warned that:

> "cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially

costly, because they chill the very conduct the antitrust laws are designed to protect."

See Cargill, 479 U.S. at 121 n.17; *Monsanto,* 465 U.S. at 763-64. The Court in *Sharp* recently applied that principle to avoid creating a *per se* violation where it would "be extremely difficult . . . to convince a jury" that the conduct at issue, even if competitive, was lawfully motivated:

> "Manufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages. . . . "

108 S.Ct. at 1521.

Competitor antitrust actions based upon nonpredatory prices allegedly resulting from vertical maximum price fixing pose similar problems. The price-cutting they challenge is both the essence of competition and a real threat to inefficient competitors. As occurred here (and in *Indiana Grocery*), a competitor could attempt to fend off such competition with a lawsuit like this. Moreover, as USA Petroleum has contended in this case,[9] the competitor

could contend that it can use as evidence of maximum price fixing (i) the manufacturer's "subsidization" of its dealers' lower prices by granting discounts, (ii) the manufacturer's suggestion of lower prices to its dealers and (iii) decreases in the dealers' prices following decreases in the manufacturer's wholesale prices. The threat of a competitor lawsuit easily could deter a manufacturer from engaging in this conduct, all of which is lawful[10] and procompetitive. *See 324 Liquor Corp. v. Duffy,* 479 U.S. 335, 341-42 (1987) ("Our recent decisions recognize the possibility that a vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition"). The Court should announce a nationwide antitrust injury rule that precludes competitor actions for nonpredatory vertical maximum price fixing in order to avoid any deterrence of this procompetitive conduct.

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[9] USA Petroleum responded more than two years after it filed its complaint to an Interrogatory seeking all facts and witnesses supporting its contention that ARCO engaged in vertical price fixing, as follows:

> "USA has thus far based its contentions relating to the retail price maintenance conspiracy alleged in the complaint upon the inferences reasonably drawn from the pattern of ARCO's pricing conduct and the competitive price allowances given by ARCO to its dealers, that there was an agreement that the dealers to whom the allowances were given would lower their prices to undercut or meet the prices of independent dealers within the same ARCO pricing zones and that the allowances inevitably and inexorably caused them to do so. USA executives, particularly Mark Conant, were made aware by field personnel that ARCO stations were systematically pricing their gasoline below the prices of USA and other independents on an apparently fixed margin basis, keyed directly to the prices charged by the independents and apparently without regard to the ARCO dealers' costs or profits from such sales. Based upon the accumulated knowledge and experience of USA management that the major oil companies are able to and do induce and/or coerce their dealers to follow suggested prices, USA concluded that there was an express or implied understanding and conspiracy that the competitive price allowances being offered by ARCO were provided for the purpose and with the effect of having dealers set prices which would eliminate independents from the market."
>
> "USA is continuing to investigate and seek discovery of information related to its claims and continues to reserve the right to prove conspiracy and damages by any legally sufficient method that the evidence may support."

(CR 84:47-48.)

[10] *See* pp. 17-18 above.

Of course, the Court can allow an action by a competitor who can prove that the fixed price ceilings that injure him are predatory, because such an action coincides with the interests of consumers. Predatory prices, by definition, could result in the "elimination of competition" and in the creation and maintenance of " 'monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.' " *Cargill*, 479 U.S. at 118 & 121 n.17. However, any exception for predatory price fixing is inapplicable here because the District Court found that the challenged prices are not predatory, and USA did not challenge that finding on appeal. *See* 859 F.2d at 703 (Alarcon, J., dissenting).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

April 7, 1989.

Respectfully submitted,

HUGHES HUBBARD & REED
RONALD C. REDCAY
(COUNSEL OF RECORD)
MATTHEW T. HEARTNEY
JAMES F. SPEYER
555 South Flower Street
Los Angeles, California 90071

HUGHES HUBBARD & REED
OTIS PRATT PEARSALL
PHILIP H. CURTIS
One Wall Street
New York, New York 10005

FRANCIS X. MCCORMACK
DONALD A. BRIGHT
EDWARD E. CLARK
RICHARD C. MORSE
PAUL J. RICHMOND
Atlantic Richfield Company
515 South Flower Street
Los Angeles, California 90071

Attorneys for Petitioner
Atlantic Richfield Company

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

USA PETROLEUM COMPANY,
Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

No. 87-5681

D.C. No.
CV 83-3508-WPG

OPINION

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
November 4, 1987 — Pasadena, California

Filed October 7, 1988

Before: Arthur L. Alarcon, Dorothy W. Nelson and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt; Dissent by Judge Alarcon

COUNSEL

Maxwell E. Blecher, Blecher & Collins, Los Angeles, California, for the plaintiff-appellant.

Ronald C. Redcay, Hughes, Hubbard & Reed, Los Angeles, California, for the defendant-appellee.

OPINION

REINHARDT, Circuit Judge:

USA Petroleum Company (USA) sued Atlantic Richfield Company (ARCO) for violations of the Sherman Act, the Robinson-Patman Act, the Cartwright Act, and various state laws. USA subsequently voluntarily withdrew with prejudice its claim under section 2 of the Sherman Act. ARCO moved for summary judgment on USA's claim under section 1 of the Sherman Act, 15 U.S.C. § 1, and the district court granted its motion. The court entered judgment for ARCO under Fed.R.Civ. P.54(b), and USA timely appealed. We reverse.

I.

ARCO is an integrated oil company which, among other things, markets gasoline in the western United States. It sells gasoline to consumers both directly and indirectly through ARCO-brand dealers. USA is an independent marketer of gasoline, which it sells at retail under the brand name USA. USA competes directly with ARCO dealers at the retail level.

USA alleges that ARCO conspired with retail service station dealers selling ARCO-brand gasoline to fix retail prices at below-market levels. USA alleges that "ARCO's strategy was to eliminate the independents by fixing and subsidizing below-market prices and siphoning off the independents' volumes and profits," and that it succeeded in that strategy. According to USA, many independents have been driven out of business. ARCO's subsidies consisted of temporary volume allowances, temporary competitive allowances, and other price allowances extended to its distributors and dealers.

For the purpose of reviewing the district court's summary judgment order, we must assume these allegations to be correct. *See Baker v. Department of Navy,* 814 F.2d 1381, 1382 (9th Cir. 1987).

The district court ruled that "[e]ven assuming that [USA] can establish a vertical conspiracy to maintain low prices, [it] cannot satisfy the 'antitrust injury' requirement of Clayton Act § 4, without showing such prices to be predatory. Under the circumstances here concerned . . . no such showing can be made." We disagree.

II.

[1] The question on appeal is whether in the absence of proof of predatory pricing a competitor can recover damages because of a maximum resale price maintenance agreement. Specifically, we must decide whether a competitor's injuries resulting from vertical, non-predatory, maximum price fixing fall within the category of "antitrust injury". This is a difficult question, and one of first impression in this circuit. The Supreme Court has not spoken on this issue, and among the circuit courts only the Seventh Circuit has taken a position. *See Jack Walters & Sons Corp. v. Morton Building, Inc.,* 737 F.2d 698 (7th Cir. 1984), discussed below. The question requires us to look closely at the purposes and policies underlying the antitrust laws, and to determine which application of the doctrine of "antitrust injury" best implements those purposes and policies.

[2] The concept of "antitrust injury" was put forward in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977):

> We therefore hold that for plaintiffs to recover treble damages . . . they must prove more than injury

> causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

In *Brunswick*, the plaintiffs argued that an illegal merger had kept alive failing competitors. The claim was that a violation of the antitrust laws had prevented the plaintiffs from obtaining monopoly profits. The Supreme Court's decision was not surprising: a plaintiff should not be able to claim damages for being unable to gain a monopoly position, the type of advantage the antitrust laws were meant to prevent. *See id.* at 487-88. The Court held that when the injury claimed "was not of 'the type that the statute was intended to forestall,'" damages under section 4 of the Clayton Act would not be available. *Id.* (quoting *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967)).[1] *See Orion Pictures Distribution Corp. v. Syufy Enters.*, 829 F.2d 946, 948-49 (9th Cir. 1987) (no antitrust injury where the injury claimed was caused by a breach of contract, not by the alleged antitrust violation).

[1]One commentator summarized the holding of *Brunswick* as follows:

> Even if the plaintiff can show an antitrust violation, courts should allow treble damages only for injuries reflecting a disruption of competition in the plaintiff's market. From this perspective, *Brunswick* was an easy case. The plaintiffs may well have shown a violation of § 7 — the mere possibility that a large firm active in many markets will cut prices or use other monopolization tactics in a new market is enough to show a § 7 violation — but they failed to show that their losses stemmed from the realization of this possibility. The defendant had merely kept afloat businesses that otherwise would have failed. It had not affected prices in any way. The "lost profits" the plaintiffs complained of were the result of the very situation that the antitrust laws are supposed to encourage — free competition among as many firms as a market can support.

Note, "Antitrust Standing, Antitrust Injury, and the Per Se Standard", 93 *Yale L.J.* 1309, 1320 & n.58 (1984).

III.

To determine whether the injury USA alleges is of the type the antitrust laws were meant to prevent, we must look first to the Supreme Court's discussions of price fixing under the antitrust laws.

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 151 (1940), a case involving horizontal price fixing, the Supreme Court held that price-fixing agreements were *per se* illegal. The Court responded as follows to the argument that the fixing of prices should be legal if the prices fixed were reasonable:

> The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such

> schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.

Id. at 221. To the argument that the prices had been fixed in such a way as to stabilize the market, the Court stated:

> [I]n terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.
>
> . . .
>
> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*
>
> . . .
>
> Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. . . . Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.

Id. at 223, 225-26 n.59.

[3] The Supreme Court in a later case thought it evident that the rule that price fixing was *per se* illegal extended to the fixing of maximum prices.

> The Court of Appeals erred in holding that an agreement among competitors to fix maximum resale prices of their products does not violate the Sherman Act. For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*"

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951).

Kiefer-Stewart involved both a vertical maximum price fixing (maximum resale price maintenance) agreement and a horizontal agreement among competitors to impose that price restraint. *Id.* at 212. When the issue of vertical maximum price-fixing was more directly raised, the Supreme Court affirmed that that form of market manipulation was covered by the *per se* rule against price fixing.

> We think *Kiefer-Stewart* was correctly decided and we adhere to it. Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single

product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices. It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.

Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968) (footnote omitted).[2]

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[2]The establishment of a *per se* rule against maximum vertical price fixing is more than merely a recognition that the anticompetitive effects of the practice outweigh the procompetitive effects. Dissent at 12723 n.1. Rather, it is a recognition that "such [procompetitive] cases are not sufficiently common or important enough to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549, 2557 n.16 (1977). Indeed, "*per se* rules are appropriate only for conduct that is manifestly anticompetitive, that is conduct that would always or almost always tend to restrict competition and decrease output." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988) (internal quotes and citations omitted).

In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court refused to withdraw maximum price fixing from the *per se* rule.

> Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal — even if not economic — footing as agreements to fix minimum or uniform prices. The per se rule "is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition."

Id. at 348 (brackets in *Maricopa County*) (quoting Rahl, "Price Competition and the Price Fixing Rule — Preface and Perspective", 57 *Nw. U.L. Rev.* 137, 142 (1962)) (footnote omitted). It is clear that maximum resale price maintenance remains *per se* illegal.[3]

With this in mind, the dissent's flat assertion, based on Professor (now Judge) Easterbrook's neo-classical economic views, that "[m]aximum vertical price fixing lacks the potential anticompetitive effects that maximum horizontal price fixing has, and in contrast has the potential for creating a competitive benefit" is simply irrelevant. Dissent at 12725-26 (citing Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n.20 (1981)). To the extent that the Supreme Court's view of this issue differs from Judge Easterbrook's, we are required to apply the former.

[3]Recently, in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the Solicitor General and a number of other *amici* asked the Supreme Court to reconsider the inclusion of resale price maintenance within the *per se* rule. The Court declined to do so. *Id.* at 761-62 n. 7; *see Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988) (reaffirming the *per se* illegality of vertical price agreements).

III.

We also look to the legislative history of the antitrust laws for guidance. Professor Eleanor Fox has summarized the findings of historians as follows:

> As history teaches, "efficiency" is not the reason for antitrust. Indeed, those who valued efficiency more than competition opposed antitrust bills on grounds that they would constrain some activity that might save costs for a producer and forbid some activity that does not interfere with optimal allocation of resources. Rather than standing for efficiency, the American antitrust laws stand against private power. Distrust of power is the one central and common ground that over time has unified support for antitrust statutes. Interest of consumers have been a recurrent concern because consumers have been perceived as victims of the abuse of too much power. Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.

Although the dissent disclaims taking any position on whether maximum vertical price fixing should any longer be *per se* illegal, dissent at 9 n. 5, it is almost impossible to read the opinion's lengthy discourse of the benefits of this practice as saying anything else. It claims that ARCO's competitors are not harmed by its conduct, and that its consumers will only benefit. Yet, as discussed in Part III of this opinion, the Supreme Court has established *per se* rules against certain conduct only "for conduct that is manifestly anti-competitive, that is conduct that would always or almost always tend to restrict competition. . . . " *Business Elecs. Corp.*, 108 S. Ct. at 1519 (internal quotes and citations omitted).

> One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity of enterpreneurs): competition as process. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair.

Fox, "The Modernization of Antitrust: A New Equilibrium", 66 *Cornell L. Rev.* 1140, 1152-54 (1981) (footnotes omitted); *see* R. Hofstadter, "What Happened to the Antitrust Movement?", in *The Paranoid Style in American Politics and Other Essays* 188, 199-200 (1965).

Price-fixing of any kind distorts in a basic way the competitive process the antitrust laws were meant to protect. Two prominent commentators have described vertical price fixing as follows:

> [S]uccessfully maintained vertical price fixing is often the expression of economic power based on market imperfections, imbalances in bargaining power, or the presence of some level of oligopoly-like power due to trademarks or product differentiation. As such, vertical price fixing directly interferes with the freedom and opportunity of retail competitors to compete on the merits and usually results in higher prices to consumers. It enables the proponent of a restraint to assert an absolute property right and to suppress distributor competition on price, denying the right of independent distributors to succeed or fail on the competitive merits.

Flynn & Ponsoldt, "Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes", 62 *N.Y.U.L. Rev.* 1125, 1148 (1987).

The Supreme Court cases echo the historians' conclusions regarding the objectives of the antitrust laws. The Court states that the rules against price fixing have a number of objectives, including the protection of the competitive process. Congress intended that market forces alone determine what goods and services are offered, at what price these goods and services are sold, and whether particular sellers succeed or fail. *See, e.g., Socony*, 310 U.S. at 221, 223, 225-26 n.59; *Kiefer-Stewart*, 340 U.S. at 213 (price fixing conspiracies "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"); *Albrecht*, 390 U.S. at 152-53 (price fixing conspiracies "severely intrude upon the ability of buyers to compete and survive in [the] market"); *Maricopa County*, 457 U.S. at 348 ("The *per se* rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' ") (quoting Rahl, "Price Competition and the Price Fixing Rule — Preface and Perspective", 57 *Nw. U.L.Rev.* 137, 142 (1962)). When sellers conspire to fix prices, the market mechanism is distorted: prices may be driven higher,[4] some goods and services may not be offered, and sellers may succeed or fail for reasons other than their ability to respond to the demands of the market. Rules against price-fixing are thus meant to prevent harm to both consumers and to sellers.

The "antitrust injury" standard requires us to determine whether the plaintiff's injuries resulted from a disruption of competition in the plaintiff's market caused by the defendant's antitrust violation. *See generally* Note, "Antitrust Standing, Antitrust Injury, and the Per Se Standard", 93 *Yale L.J.* 1309 (1984). In the present case the inquiry seems straightforward: USA's claimed injuries were the direct result, and, indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries.

[4] ARCO argues that USA, as ARCO's competitor, cannot claim an antitrust injury, because injury to competitors is not the type of injury that the rule against maximum resale price maintenance was meant to prevent — at least in cases where predatory pricing is not alleged.[5] ARCO's argument misconceives the Supreme

[4]The dissent's contention that maximum vertical price fixing is "less destructive than minimum price fixing because it generally results in lower prices to consumers," Dissent at 12725-26, is questionable at best, but in any event simply irrelevant. Both violations are classified as *per se* because the resulting harm to competition is extremely serious. Moreover, the Ninth Circuit case the dissent cites for its proposition, *Northwest Publications Inc. v. Crumb*, 752 F.2d 473, 475 (9th Cir. 1985), simply does not say what the dissent says it does. Although we did note that these restraints "*arguably* benefit consumers," *id.* (emphasis added), we also enumerated some of the reasons, as we do above, why the Supreme Court still holds that "maximum price-fixing is as pernicious as minimum price-fixing." *Id.* We discuss below our views of the other case the dissent cites, *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

[5]In essence, this is also the position the dissent takes. "Maximum vertical price fixing is destructive when the prices set are predatory." Dissent at 12726-27 (citing *Matsushita*, 475 U.S. at 584). However, the *Court* in *Matsushita* did not comment on whether maximum vertical price maintenance is destructive in the absence of predatory

Court's analysis. The Supreme Court has not discussed maximum resale price maintenance as a separate type of antitrust violation, but only as one form of price fixing. *See Arizona v. Maricopa County Medical Society*, 457 U.S. at 348; *Albrecht v. Herald Co.*, 390 U.S. at 152-53. Thus, the proper question is not what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent. The Supreme Court has indicated that the *per se* rule against price-fixing is aimed at the long-term as well as the short-term effects such practices have in the market, and not merely the immediate consequences for prices. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S.Ct. 1515, 1519-20 (1988) (characterizing interbrand competition as the primary concern of antitrust law, and listing "the creation and maintenance of small businesses" as one of its objectives). The removal of some elements of price competition distorts the markets, and harms all the participants: those retailers which have lost their ability to set prices, the other retailers in the same market who are harmed by the distorted market, and the consumers. Even if we were to analyze the question at the more specific level of maxi-

pricing. That issue was simply not before the Court or considered by it.

The dissent's position would preclude a finding of a violation of the antitrust laws in the case of the vast majority of unlawful maximum resale price agreements — i.e., those not accompanied by predatory conduct. No one, except an unenthusiastic Department of Justice and, under certain circumstances, the dealers who are parties to the resale price maintenance agreement, would have standing to bring suit to challenge conduct which undeniably is forbidden by the antitrust laws. This would virtually amount to a finding that *Brunswick* has, *sub silentio*, overruled *Albrecht, Kiefer-Stewart,* and *Maricopa County*. P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 335.2(i), at 277 n.56 (1987 Supplement).

mum resale price fixing, given the long-term consequences of that practice we would reach the same result for similar reasons.

ARCO relies in part on *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S.Ct. 484 (1986). That reliance is misplaced. In *Cargill,* plaintiff, a large beef-packing firm, sought injunctive relief to enjoin the merger of the second and third largest beef-packing firms in the industry. The plaintiff asserted that the defendant would be able to lower its prices due to "multiplant efficiencies". *Id.* at 491. This would require plaintiff in turn to lower its prices, thus lowering its profits. *Id.* at 492. The Supreme Court held that this injury did not constitute "antitrust injury"; the Court relied in part on the fact that plaintiff had not shown that the defendant had engaged or would engage in unlawful or predatory pricing. *Id.* at 492-94. In other words, in *Cargill* the plaintiff failed to show that the pricing practices that it claimed was causing or would cause its injuries were illegal.[6] In fact, the Court termed the defendant's pricing policies "vigorous competition" and said that the antitrust laws protect small business "only against the loss of profits from practices forbidden by [those] laws." *Id.* at 492. In the present case, plaintiff's injuries result directly from pricing practices that

[6]For a single firm's pricing practices to violate the antitrust laws, that firm must be engaged in predatory pricing or discriminatory pricing (the Robinson Patman Act, 15 U.S.C. § 13(a)). However, much less need be shown to assert that the pricing practices of two or more firms have violated the antitrust laws: it need only be shown that those firms have conspired to fix prices. *See generally* H. Hovenkamp, *Economics and Federal Antitrust Law* 92-124, 159-61, 172-73, 258-65 (1985). Here, a price-fixing agreement between ARCO and its dealers is alleged.

defendants admit (for the purpose of this appeal) are forbidden by the antitrust laws and are therefore illegal.[7]

In *Cargill*, as in Brunswick, the connection between the antitrust violation and the activity which caused the alleged injury is attenuated or indirect. In those cases, the violation was a merger or an acquisition, and the injury occurred because of pricing practices which were themselves legal.[8] As the Court held, injuries derived from legal pricing practices are not necessarily the type of injuries rules against certain types of mergers and acquisitions were meant to prevent. *See Cargill*, 107 S. Ct. at 492-93; *Brunswick*, 429 U.S. at 486-88.

IV.

ARCO claims that USA does not have standing under the "antitrust injury" standard because maximum resale price maintenance increases rather than decreases compe-

[7]There is another reason why *Cargill* is not dispositive. The law against monopoly involved in *Cargill*, section 7 of the Clayton Act, attempts to prevent market structures in which the competitive process is vulnerable to distortion. The distortion is only potential. In price-fixing cases, by contrast, the distortion of the price mechanism has, by definition, already occurred.

[8] This characterization applies equally well to *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235 (3rd Cir. 1987), *cert. denied*, 56 U.S.L.W. 3843 (U.S. June 13, 1988). In *Alberta Gas*, plaintiff claimed that defendant's acquisition of a company caused the acquired company to cancel a project. Because the project was canceled, the acquired company bought less of plaintiff's product. The court found that the plaintiff had not shown antitrust injury. This, too, is an unsurprising finding: the connection between violation and injury is too attenuated for the plaintiff to claim, without more, that the injury involved is of the type the particular antitrust rule was meant to prevent.

tition.[9] Maximum resale price maintenance brings prices lower, not higher. If competitors fail, it is because they are not able to match the low prices charged by the

[9] ARCO relies on *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), heavily, and the dissent does so equivocally, recognizing that the case is not controlling. In fact, *Murphy Tugboat* is wholly inapplicable. In *Murphy Tugboat*, one tugboat company complained of the low fees charged by another tugboat company for the services of its licensed inland pilots. These lower fees were the result of a labor agreement entered into between the inland pilots and one of the defendants. Because the plaintiff was not a competitor in the area covered by the labor agreement, the legality of that agreement was irrelevant to our principal inquiry. In any event, we ultimately held that the agreement was valid. *Id.* at 1259. As a result, the plaintiff's claim depended entirely on whether the defendants' "overall pricing policies constitute[d] anticompetitive conduct." *Id.* at 1259. With the labor agreement, and thus the price-fixing allegation removed from the case, an antitrust violation could only be demonstrated by proof of a predatory pricing scheme. This is in stark contrast to the present case, in which the defendant's unlawful price-fixing is (for the purpose of the summary judgment motion) conceded and thus an antitrust violation is established without any need to show predatory pricing.

As the dissent points out, we did state in *Murphy Tugboat* that "[the anti-trust laws] do not prohibit non-predatory conduct that results in a lower price to the consumer." Dissent at 12728-29. However, the dissent ignores the crucial fact that, in *Murphy Tugboat*, predatory pricing was a necessary element because, in the absence of such conduct, there was no *violation* of the antitrust laws. (It also fails to mention that *Murphy Tugboat* was not a maximum resale price case and did not purport to discuss the role of predatory conduct in such cases.) It was in connection with our discussion of whether a *violation* had occurred that we made the statement that the dissent now lifts wholly out of context — the statement that the antitrust laws do not protect inefficient businessmen against others who establish lower prices but do not engage in predatory conduct. Here, however, we are not seeking to determine whether a *violation* of the antitrust laws occurred. For our purposes, there is a *conceded violation* of those laws; specifically, it is agreed that a violation

maximum resale price maintenance retailers. This is a typical cost of competition, according to ARCO, and not a problem for antitrust policy. ARCO relies heavily on the argument that the antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). However, we have earlier discussed the problems with misreading that aphorism:

> The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. However, the converse is *not* true. Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition.

occurred in the absence of predatory pricing. The only question here is whether there is a cognizable injury.

In short, *Murphy Tugboat* deals solely with the issue of when a plaintiff who is not the defendant's competitor in the area in question may claim that an antitrust violation has occurred. The question of when a plaintiff who *is* a competitor can prove "antitrust injury" is the basic issue in the present case. Indeed, it is worth noting that the Seventh Circuit did not consider *Murphy Tugboat* sufficiently on point to mention it when it considered the same question now before this court — whether competitors have antitrust injury *standing* in maximum resale price cases. *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984).

Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir. 1988).[10]

[5] We reject ARCO's characterization that USA's injury resulted from "*increased*, not reduced . . . competition," as contrary to the antitrust laws. As in the terms of the Robinson-Patman Act, 15 U.S.C. § 13(a), the success of some firms and the failure of other firms, when due to illegal pricing practices, must be characterized as a "lessen[ing] [of] competition", not an increase in competition. Also, when firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced service to consumers. *Cf. Albrecht*, 390 U.S. at 152-53; *Socony-Vacuum*, 310 U.S. at 221.

[6] We note that commentators with a particular economic viewpoint have argued that maximum resale price maintenance should not be a *per se* violation of the antitrust laws.[11] However, we cannot ignore the fact that maximum resale price maintenance is *per se* illegal, simply because some might think that rule is unwise or because of commentators' speculation that the rule's de-

[10] See Flynn & Ponsoldt, *supra*, at 1126 n.4 (citation omitted):

> One of the more popular cliches is that the antitrust laws protect competition, not competitors. The cliche implicitly asserts that one can have competition without competitors, contains no definition of "competition," and is frequently used to deny the congressionally defined goals of antitrust policy in favor of the narrow goals assumed by the neoclassical model.

[11] *See, e.g.*, Blair & Fesmire, "Maximum Price Fixing and the Goals of Antitrust", 37 *Syracuse L. Rev.* 43 (1986); H. Hovenkamp, *Economics and Federal Antitrust Law* 247-72 (1985); Easterbrook, "Maximum Price Fixing", 48 *U. Chi. L. Rev.* 886 (1981); R. Bork, *The Antitrust Paradox* 280-98 (1978).

mise might be in sight. *See Northwest Publications, Inc., v. Crumb*, 752 F.2d 473, 475 (9th Cir. 1985); *cf. Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 707, 709 (7th Cir. 1984). The Supreme Court has clearly stated — and restated — that maximum resale price maintenance, as a form of price fixing, is *per se* illegal, and that rule binds us until the Court or Congress[12] clearly states otherwise. USA alleges that ARCO's price-fixing had the objective of forcing independent gasoline retailers from the market, and that ARCO had been largely successful in that objective. In its complaint, USA states that "more than a dozen large independents have sold out, liquidated or drastically curtailed their operations and many independent retail stations have been closed." It also states that the barriers to entry into the retail gasoline market have been heightened so that "once an independent is eliminated, it is highly unlikely that it will be replaced." The objective and effect of ARCO's illegal pricing scheme has been to reduce the number of independent gasoline retailers, in other words, to reduce competition. USA complains that it has suffered financial losses and is being driven out of the market by ARCO's illegal price-fixing. This is the type of injury that the antitrust rules were meant to prevent.

Finally, we consider the Seventh Circuit's treatment of the issue. In *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984), Walters, a building-materials dealer, was a distributor of goods produced by Morton, a manufacturer of prefabricated farm buildings. Walters claimed, among other things, that Morton had coerced its dealers, including Walters, to maintain a conspiracy to maintain maximum resale prices. *Id.* at 706.

[12]*See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 769 (1984) (Brennan, J., concurring).

The district court dismissed Walters' claims, and the Seventh Circuit affirmed. Regarding the maximum resale price maintenance, Judge Posner, writing for the court, concluded that Walters had not shown antitrust injury:

> In the present case, even if Morton did violate the prohibition against fixing its dealers' prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no suggestion that the lower prices would have been below cost; they would have been lawful prices. . . . Walters will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust injury.

Id. at 709.

We disagree.[13] The antitrust laws were, as we discussed earlier, intended to give entrepreneurs and independent distributors an "even playing field." The competitive pro-

[13]As one commentator has noted:

> Even consumers would not be able to bring actions under the rule established in Judge Posner's opinion in *Jack Walters & Sons Corp. v. Morton Building*. . . .
>
> . . . I cannot escape the conclusion that Judge Posner — growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht* — has decided to undertake that task on his own.
>
> Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. The per se rule against resale price maintenance is definitely not among them. That fact justifies arguments, both theoretical and political. But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.

cess can only rule when participants in the process are not allowed to combine to fix prices ahead of time.[14] We conclude that the purposes and policies of the antitrust laws are best effectuated by recognizing the "standing" of competitors to enforce the antitrust laws against price-fixing conspiracies. To put the same point differently, we conclude that the injury done to the market and to competitors by price-fixing conspiracies is antitrust injury — the type of injury the antitrust laws were meant to protect.[15]

Hovenkamp, "Chicago and Its Alternatives", 1986 *Duke L.J.* 1014, 1025-26 (footnote omitted).

[14] *Cf.* Flynn & Ponsoldt, *supra*, at 1149:

> [A conspiracy to fix prices] is a direct displacement of the competitive process of price determination. It is an assumption of power by the proponent of the restraint, denying rights of distributors and consumers to make their own judgments about pricing — a denial of rights guaranteed by the goals of antitrust policy. Congress did not leave to the proponents of such restraints the authority to determine unilaterally the scope of the contract rights of distributors. Similarly, Congress did not intend the proponents of maximum price fixing to determine what the best price should be for the benefit of the public.

[15] We recognize that our decision conflicts with that of the Seventh Circuit. In *U.S. v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987), we said "absent some good reason to do so, we are disinclined to create a direct conflict with another circuit." We did not intend by that statement to surrender our authority to decide important issues of first impression or to suggest that we would adopt the view of the first circuit to consider such issues in every instance. Rather, we meant that we would give respectful attention to the views of the other circuit and carefully evaluate that circuit's analysis before settling on ours. Here we have done so and we find good reason to disagree with the result reached by Judge Posner.

For the reasons stated above, we reserve the decision of the district court and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

ALARCON, Circuit Judge, dissenting:

I.

In this antitrust action, plaintiff/appellant USA Petroleum Company ("USA") appeals from the district court's order granting summary judgment in favor of defendant/appellee Atlantic Richfield Company ("ARCO") for USA's failure to demonstrate "antitrust injury." I respectfully disagree with the majority's conclusion that the district court erred. Because USA failed to present any facts showing antitrust injury, I would affirm.

II.

USA, a gasoline retailer, brought this action to challenge ARCO's marketing program in which ARCO discontinued its credit cards and offered lower gasoline prices to consumers. USA claimed ARCO, a major integrated oil company, violated section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), by conspiring with certain retail dealers to set retail prices for ARCO-brand gasoline at levels USA could not match. USA claimed ARCO violated section 2 of the Sherman Act, 15 U.S.C. § 2 (1982), by attempting to monopolize the retail gasoline market through the "predatory pricing" of its ARCO-brand gasoline. USA also asserted claims for violations of the Robinson-Patman Act, the Cartwright Act and various state laws.

USA claimed ARCO's increased price competition resulted in it having "lost sales it otherwise would have

made." USA sought compensation for these lost sales under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), which provides, in part, "[a]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained."

ARCO moved for summary judgment on USA's sections 1 and 2 claims. ARCO contended USA's section 2 claim failed for no "dangerous probability" existed that ARCO-brand sellers would monopolize the market. ARCO contended USA's section 1 claim failed for want of antitrust injury. ARCO contended the injury USA described in its complaint was not antitrust injury because it resulted solely from non-predatory price competition.

In response to this motion, USA voluntarily dismissed its section 2 claim. Thereafter, ARCO renewed its motion concerning USA's section 1 claim. The district court held that, even assuming a vertical conspiracy to fix maximum prices, USA "cannot satisfy the 'antitrust injury' requirement of Clayton Act § 4, without showing . . . [the prices charged for ARCO gasoline] to be predatory." The court found those prices were not predatory. Accordingly, it granted ARCO's motion and dismissed USA's complaint with prejudice.

III.

USA claims the district court misapplied the substantive law when it concluded the injury USA suffered as a result of the alleged price-fixing conspiracy was not antitrust injury, i.e. "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 489 (1977). USA contends it suffered antitrust injury because its injury resulted from an illegal price-fixing conspiracy.

We review independently and non-deferentially a contention that the district court misapplied the substantive law in its order granting summary judgment. *Ashton v. Cory,* 780 F.2d 816, 818 (9th Cir. 1986). We view the evidence in the light most favorable to USA, the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Baker v. Department of Navy,* 814 F.2d 1381, 1382 (9th Cir.), *cert. denied,* 108 S. Ct. 150 (1987).

IV.

The issue presented on this appeal is a difficult question of first impression. We are asked to determine whether a retail competitor suffers antitrust injury in the form of lost profits as a result of a non-predatory maximum vertical price fixing agreement. We must assume for purposes of this appeal that USA could prove a *per se* violation of Sherman Act § 1 for maximum vertical price fixing. However, as the Supreme Court in *Matsushita* instructs, " . . . [USA] must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct." 475 U.S. at 586.

The concept of antitrust injury had its origins in the Supreme Court's decision in *Brunswick,* 429 U.S. 477. In *Brunswick,* the plaintiff bowling alley operators brought a treble damage action under section 4 of the Clayton Act against a competing bowling alley operator. Plaintiffs claimed their competitor's acquisition of several bowling alleys in the proximity of their operation violated section 7 of the Clayton Act inasmuch as it threatened to "create a monopoly." *Id.* at 480. To establish damages, the plaintiffs demonstrated that had the competitor not acquired the alleys, those alleys would have closed and

plaintiffs' profits would have increased from the resultant reduction of competition.

The Supreme Court held that plaintiffs seeking treble damages under section 4

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 488-89 (emphasis in original). Applying this principle, the Court held the plaintiffs' claim failed for their injury resulted solely from preservation of competition. An injury suffered on account of preservation of competition, according to the Court, is not one the "antitrust laws were intended to prevent." *Id.* at 488.

V.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982) provides in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." Price fixing agreements, whether they set minimum or maximum prices or whether they are horizontal or vertical agreements, are all deemed *per se* violations of Sherman Act § 1 despite the fact that some types of price fixing agreements may have competitive benefits. *See e.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S. Ct. 720, 724 (1987) (minimum vertical price fixing); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (horizontal

maximum price fixing); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum vertical price fixing); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (vertical and horizontal maximum price fixing); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (horizontal minimum price fixing). The *per se* rule is based in part on "economic prediction, judicial convenience, and business certainty." 457 U.S. at 354. Thus, "[a]s in every rule of general application, the match between the presumed and the actual is imperfect." *Id.* at 344. *See also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n. 16 (1977) ("cases that do not fit the generalization may arise"). Because the match between the conduct and the rule may be imperfect, it follows that some conduct which does not fit the reason for finding an antitrust violation may not result in antitrust injury or may result in only limited antitrust injury.[1]

The majority states that the proper question is not "what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent." Maj. op. at 12. This inquiry ignores the *Brunswick* re-

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[1]USA asserts that the *per se* rule conclusively presumes that maximum vertical price fixing is anticompetitive so it can never have any procompetitive consequences. On the contrary, the *per se* rule is a recognition that although price fixing agreements may have some procompetitive potential, the anticompetitive effects on balance outweigh the procompetitive aspects. *See Continental T.V., Inc.* 433 U.S. at 50 n.16. Antitrust injury analysis requires that the "injury" reflect the anticompetitive effect of the violation, not any procompetitive effects. *See Brunswick*, 429 U.S. at 488-89. For examples of antitrust violations without antitrust injury, *see Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197 (7th Cir. 1986); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1469-1470 (1985); 2 P. Areeda & D. Turner, *Antitrust Law*, ¶¶ 345 & 346.

quirement that the injury reflect the anticompetitive effect of the violation. The anticompetitive effects will be different depending on the type of price fixing agreement. Thus, the Supreme Court instructs us that:

> The term "restraint of trade" in [Sherman Act § 1], like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances.

Business Electronics Corp., v. Sharp Electronics Corp., — U.S. —, 108 S. Ct. 1515, 1523 (1988). Therefore, we must analyze "illegal price fixing agreements" to determine whether the agreement is horizontal or vertical *and* whether it sets maximum or minimum prices so we can properly determine the economic consequences and anticompetitive effects. This inquiry is necessary to determine whether an injury allegedly caused by "illegal price fixing" is of the type the antitrust laws were meant to prevent.

In general, horizontal price fixing agreements are illegal because they create market power that did not previously exist and this cooperative action among competitors creates a restraint that is otherwise not possible. 7 P. Areeda, *Antitrust Law,* ¶ 1437 (1986). In contrast, a vertical price restraint ordinarily does not increase anyone's market power but merely reflects existing power of one party in the marketplace. 7 P. Areeda, *Antitrust Law,* ¶ 1437 (1986). The impact of vertical price restrictions is to reduce or eliminate intrabrand competition[2] without

[2]Intrabrand competition involves competition among sellers of the same brand of the same product. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n. 19 (1977).

necessarily impacting interbrand competition.[3] *See Continental T.V., Inc.*, 433 U.S. at 51-52 (1977); Shores, *Vertical Price-Fixing And The Contract Conundrum: Beyond Monsanto,* 54 Fordham L. Rev. 377, 379 (1985). In contrast, horizontal price restraints drastically reduce interbrand competition. *See White Motor Co. v. United States,* 372 U.S. 253, 267 (1963) (Brennan, J., concurring); *see also Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348 n. 18 (1982) ("horizontal restraints are generally less defensible than vertical restraints"); Shores, *supra* at 401. A reduction in interbrand competition causes more concern under the antitrust law, because interbrand competition is seen as the primary concern of the antitrust law. *Continental T.V., Inc.*, 433 U.S. at 52 n. 19.

The effect of minimum price fixing, whether horizontal or vertical, is generally higher prices. Pitofsky, *In Defense of Discounters: The No-Frills Case for A Per Se Rule Against Vertical Price Fixing,* 71 Geo. L. J. 1487, 1488 (1983); *324 Liquors,* 475 U.S. 335, 107 S. Ct. at 723. In addition, minimum vertical price fixing, unlike some other types of vertical restraints, is similar to horizontal price fixing because it restricts interbrand competition. *Continental T.V., Inc.*, 433 U.S. at 51 n. 18 *(citing White Motor Co.,* 372 U.S. at 268 (Brennan, J., concurring)).

Maximum price fixing, whether vertical or horizontal, is not viewed as being as destructive as minimum price fixing principally because it generally results in lower prices to consumers. *Northwest Publications, Inc. v. Crumb,* 752 F.2d 473, 475 (9th Cir. 1985); *accord Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d

[3]Interbrand competition involves competition between sellers of different brands of the same generic product. *Continental T.V., Inc.*, 433 U.S. at 52 n. 19.

698, 708-709 (7th Cir.) *cert. denied,* 469 U.S. 1018 (1984). Maximum horizontal price fixing is viewed as more anticompetitive than maximum vertical price fixing because of its potential to eliminate interbrand competition.[4] Maximum vertical price fixing lacks the potential anticompetitive effects that maximum horizontal price fixing has, and in contrast has the potential for creating a competitive benefit. *See* Easterbrook, *supra,* at 890 n.20.[5] Indeed, maximum vertical price fixing by a single manufacturer may stimulate interbrand competition.[6] *See 324 Liquor*

[4]For a discussion of the potential anticompetitive effects of maximum horizontal price fixing, *see* Easterbrook, *Maximum Price Fixing,* 48 U. Chi. L. Rev. 886, 900-908 (1981). Despite the potential anticompetitive effects of maximum horizontal price fixing, Easterbrook argues that the *per se* rule should be abandoned in the maximum horizontal price fixing case. *Id.*

[5]Because maximum vertical price fixing is viewed as having some pro-competitive benefits and because its economic effect is not very different from nonprice vertical restraints, *Continental T.V., Inc.,* 433 U.S. at 69 & n. 10, many commentators have argued that it should be analyzed under the rule of reason. Easterbrook, *supra* at 890 n.20; Pitofsky, *supra,* at 1490 n. 17; *cf. Vertical Price Fixing,* 98 Harv. L. Rev. 983 (1985); *see also, The Jeanery, Inc. v. James Jeans, Inc.,* 849 F.2d 1148, 1153 n.3 (9th Cir. 1988) (presenting, "[a]n abbreviated bibliography of this debate"). I also note that the Supreme Court was asked by the Solicitor General and other *amici* in *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752 (1984), to reconsider whether vertical price restrictions should always be unlawful. The Supreme Court declined to reach the question because it had not been presented in the district court nor raised on appeal. 465 U.S. at 761 n. 7. Similarly, this argument was not raised in the case before us, and I express no opinion as to the merits of this argument.

[6]I note that the Supreme Court in dictum in *Business Electronic Corp.,* 108 S. Ct. at 1520 stated that "vertical price restraints reduce *inter*brand price competition." From the Court's citations it is clear that the Court was referring to *minimum* vertical price restraints. The Court cites *Continental T.V., Inc.,* 433 U.S. at 51 n. 18, which

Corp., 479 U.S. 335, 107 S. Ct. at 724 ("a vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition") (emphasis in original). Maximum vertical price fixing is destructive when the prices set are predatory. *See Matsushita,* 475 U.S. at 584. Below cost prices are seen as predatory "chiefly in cases in which a single firm having a dominant share of the market, cuts its prices in order to force competition out of the market, or perhaps to deter potential entrants from coming in." *Id.* at 584 n.8. Thus USA's injury must be viewed in the context of the alleged antitrust violation to determine whether the alleged injury results from the *anticompetitive* aspects of the maximum vertical price fixing agreement.

quotes Justice Brennan's concurring opinion in *White Motor Co. v. United States,* 372 U.S. 253, 268 (1963) where he stated, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." Resale price maintenance has traditionally been used to refer to *minimum* vertical price fixing and was used by Justice Brennan in the context of a minimum vertical price fixing case. Similarly, the Court relies on Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 Colum. L. Rev. 282, 294 (1975) in support of its comment. Again, Posner uses the term "resale price maintenance" to refer to minimum vertical price fixing. *See id.* at 292, n.36. Furthermore, Posner uses Justice White's quote to refer to the "rule of *Dr. Miles*" which was a minimum vertical price fixing case. *Id.* at 294. Posner criticizes the Court for not drawing a distinction between minimum and maximum vertical price fixing. *Id.* at 297.

VI.

The antitrust injury analysis in a maximum vertical price fixing agreement is difficult because, as one commentator states, "[s]upplier regulation of the *maximum* prices charged by dealers is virtually never anticompetitive." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 335.2h, n.56 (Supp. 1987); *see also* Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1469-1470 (1985) (when price fixing agreements reduce prices and increase output, no harm from the practice can be antitrust injury); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 490-492 (1980). If the conduct is not anticompetitive, it follows that no antitrust injury exists.

The most common scenario involving a maximum vertical price fixing agreement involves a suit by dealers or distributors against their suppliers. The "restraint of trade" involved in a maximum vertical price fixing agreement between a supplier and its dealers is the elimination or drastic reduction of competition in the intrabrand market. Whether a coerced dealer in fact suffers antitrust injury by such an agreement would depend on the particular circumstances. 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 346c (1978); *see e.g. Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708-09 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (maximum vertical price fixing agreement did not result in antitrust injury to dealer); *cf. Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976) *cert. denied*, 433 U.S. 910 (1977) (pre-*Brunswick* case awarding terminated dealers lost profits).

A case like the one before us invoking an action by one competitor against its rival's supplier cannot be satisfactorily resolved by adopting the analysis of the dealer versus supplier cases. Although a plaintiff does not have

to "prove an actual lessening of competition in order to recover, . . . the case for relief will be strongest where competition has been diminished." *Brunswick*, 429 U.S. at 489 n. 14. Thus, the drastic reduction or elimination of competition in the intrabrand market suggests that antitrust injury is more likely to occur in the dealer-versus-supplier cases. Furthermore, the dealer-versus-supplier cases usually involve coercion and threats which impair a dealer's "freedom" to set prices.[7]

The closest case to the facts presented here is *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). In *Murphy Tugboat*, the plaintiff tugboat company sued a rival tugboat company for treble damages under section 4 of the Clayton Act. The plaintiff claimed that the rival tugboat company entered into a price fixing agreement with inland pilots which set the fees for the pilots' services at a level that was lower than the fees otherwise charged by pilots in the San Francisco area. *Id.* at 1258. The plaintiff tugboat company claimed the pilot fee agreement was anticompetitive because the rival's package price, which included the tugs and the pilot fees, was lower than it would have been absent the agreement. If the rival's package price was lower, the plaintiff would have been able to charge a higher price or maintain price and increase market share. *Id.* at 1257-58. The plaintiff claimed these lost profits as damages.

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[7]Although USA alleged that it was "forced" to match ARCO's prices, it is difficult to see how ARCO with only 17% of the gasoline market during its most successful month "forced" USA to match ARCO's prices when most of the market had set prices above those required by ARCO. It would appear instead that USA voluntarily chose to match ARCO's reduced price to remain competitive.

We stated in *Murphy Tugboat* that the plaintiff did not and could not complain about the pilot fee agreement because the plaintiff was not operating in the pilot services market. We held that the rival's package price did not violate Sherman Act § 1 because the package price, which was always higher than the plaintiff's price, was not below cost. Therefore, the package price was not predatory and the rival did not violate Sherman Act § 1. In reaching this conclusion we stated, "[the antitrust laws] do not prohibit non-predatory conduct that results in a lower price to the consumer. The antitrust laws do not require the erection of a price umbrella for the benefit of inefficient competitors." *Id.* at 1259.

Murphy Tugboat is instructive, but it is not controlling because it differs from the present case in several important respects. First, the alleged price fixing in *Murphy Tugboat* did not exist in the plaintiff's tugboat market, it existed in the inland pilot market. Here, the alleged price fixing exists in USA's retail gasoline market. Second, in *Murphy Tugboat* the package price charged to customers was not fixed. Only one component cost of the package price (the pilot fee) was fixed. In contrast, USA alleges that ARCO fixed the gasoline price charged to retail customers, not that ARCO fixed some component cost of supplying gasoline.

My research has not disclosed a case in this circuit or in any other jurisdiction dealing with a competitor versus its rival's supplier which addresses the antitrust injury requirement of Clayton Act § 4 in the context of a maximum vertical price fixing agreement in violation of Sherman Act § 1.[8] Instead, I have found repeated affirmations

[8] *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) contains facts similar to the facts presented here. However, I do not find *King & King Enterprises* helpful because it did not discuss the antitrust injury requirement and it involved a horizontal conspiracy to fix maximum prices.

of the principle that the Sherman Act was designed by Congress as a "consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), and was not designed to insulate competitors from vigorous competition. *See Brunswick*, 429 U.S. at 488 *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) ("the antitrust laws . . . were enacted for 'the protection of *competition* not *competitors*' ") (emphasis in original); *accord Triple M Roofing Corp. v. Tremco., Inc.*, 753 F.2d 242, 243 (2d Cir. 1985) ("[t]he antitrust laws were never intended to provide a balm for the hardships occasioned by vigorous competition"); *Matsushita*, 475 U.S. at 594 ("cutting prices in order to increase business often is the very essence of competition); *cf. Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 495 (1986) ("a plaintiff seeking injunctive relief under §16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury").

VII.

Turning to the facts before us, USA has alleged that ARCO conspired with its dealers to engage in maximum vertical price fixing to set prices below the market level.[9]

[9] USA has not alleged and no facts exist in the record to suggest that any maximum horizontal price fixing agreement was also in existence. Vertical price fixing agreements which also have a horizontal element cause concern because not only do they reduce or eliminate intrabrand competition, but they have the potential to eliminate or drastically reduce interbrand competition. *See Keifer-Steward Co. v. Seagram & Sons*, 340 U.S. 211 (1951).

The district court found ARCO's prices were not predatory,[10] and USA does not challenge this finding on appeal.

The impact of ARCO's alleged maximum vertical price fixing scheme would be to reduce or eliminate intrabrand competition among ARCO brand dealers without necessarily impacting interbrand competition.[11] Arguably, interbrand competition in the "discount gasoline" submarket[12] would be stimulated by ARCO's entry into the independent retailers' market niche. At the same time those gasoline dealers in the interbrand market who already were selling at prices higher than USA and ARCO may not have been affected by ARCO's alleged price fixing agreement. In any event, the essence of USA's claim is that one of the major oil companies, ARCO, intruded upon the independent retailers' market niche by under pricing the independent retailers. The result is lower prices to consumers, but less profit for USA. USA's loss of profits from ARCO's vigorous competition is not anti-

[10]For a claim of a conspiracy to engage in *predatory pricing* the Supreme Court has stated that a plaintiff does not suffer "antitrust injury unless petitioners conspired to drive [plaintiff] out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Matsushita*, 475 U.S. at 585 n.8. USA acknowledges that this standard is inapplicable to a conspiracy to engage in maximum vertical price fixing.

[11]*See* Allison, *An Analysis of the Vertical Price-Nonprice Dichotomy,* 21 Akron L. Rev. 131 (1987). Allison conducted a study of price and non-price vertical restraints. In ten out of the eleven cases he studied involving maximum vertical price fixing and no other restraints, only intrabrand competition was affected. *Id.* at 166, table 1.

[12]USA argued below that the discount gasoline submarket was a market separate from the retail gasoline market. The district court's findings established that no separate discount gasoline market existed.

trust injury.[13] The district court did not err in granting summary judgment in ARCO's favor on the basis of USA's failure to demonstrate antitrust injury.

USA attempts to avoid this result by reformulating the *Brunswick* test. USA misstates that test as inquiring whether ARCO's alleged *anticompetitive acts* were of the type the antitrust laws were intended to prevent as opposed to whether its *injury* was of the type the antitrust laws were intended to prevent. After reformulating the test, USA devotes the bulk of its efforts to demonstrate ARCO's alleged price-fixing activities were of the type the antitrust laws were intended to prevent. Having established this to its satisfaction, USA contends "[a]ll that remains . . . is that USA show that its claimed damages flow from the presumed market distorting effects." Since, according to USA, the question of "flow" is "necessarily a fact intensive inquiry," USA concludes that this court must remand this issue for jury-determination.

USA's reformulation of the *Brunswick* test transforms it into a simple question of causation. This mistaken notion directly contravenes *Brunswick*. The *Brunswick* court held plaintiffs seeking treble damages "must prove *more* than injury causally linked to an illegal presence in the market." *Brunswick,* 429 U.S. at 489 (emphasis added). As one commentator has persuasively stated using an example similar to the facts presented here,

> Even if causation is assumed, we must ask whether the plaintiff is entitled to be free of a rival product's lowered price that is entirely lawful apart from the

[13]According to the majority, as a result of price fixing, retail competitors are "harmed by the distorted market." Maj. op. at 12711. However, the majority does not explain what the harm is or what the market distortion is.

> assumed vertical agreement.... [T]he plaintiff would rely on the assumed causation, but query whether protecting the plaintiff's interest in higher prices serves the purposes of the antitrust laws.... So long as the price of the defendant's product is itself lawful, the only reason for awarding the competitor treble damages is to encourage him to sue, but we have already seen that rationale to be insufficient. And the protection of the defendant's rivals is not the reason for prohibiting maximum resale maintenance. Those more directly affected are fully capable of suing, if they feel themselves detrimentally affected. And if they do not, perhaps the social interest in forbidding the practice is weak to begin with.

(Footnote omitted). 2 P. Areeda, *Antitrust Law* ¶ 346c (1978).

Under the majority's analysis price fixing "distorts the markets, and harms all the participants." Maj. op. at 12709-10. Thus, the majority implies that retail dealers, retail competitors and consumers all suffer antitrust injury as a result of any illegal price fixing agreement. The majority's conclusion ignores the fact that consumers are not injured by maximum vertical price fixing, and retail competitors are not injured and cannot complain about minimum vertical price fixing. *Matsushita,* 475 U.S. at 582-83, 584 n.8. Market participants may all be harmed by different types of price fixing agreements, but they can only bring an action based on the type of agreement that injures them. The majority's refusal to analyze this case in the context of a maximum vertical price fixing agree-

ment,[14] by relying instead on a generic illegal price fixing analysis, has resulted in a dissertation which is premised on "market distortions" that are never fully defined or explained.

I would affirm the district court's order granting summary judgment because USA failed to demonstrate antitrust injury.

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[14]The majority does state that, "[e]ven if [they] were to analyze the question at the more specific level of maximum resale price fixing, given the long term consequences of that practice [they] would reach the same result for similar reasons." Maj. op. at 12711. However, the long term consequences the majority notes are higher prices and reduced services to consumers. Maj. op. at 12715. USA as a competitor would not suffer antitrust injury from either of these speculative long term consequences.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
ENTERED FEBRUARY 25, 1987

USA PETROLEUM COMPANY,
Plaintiff,
v.
ATLANTIC RICHFIELD COMPANY,
Defendant.

No. 83-3508-WPG (Bx)

PRETRIAL ORDER (1) SPECIFYING UNCONTROVERTED FACTS AND (2) DETERMINING THE LEGAL SUFFICIENCY OF PLAINTIFF'S SHERMAN ACT § 1 CASE.

Defendant Atlantic Richfield Company's Motion For A Pretrial Order (1) Defining The Relevant Product Market And (2) Determining The Legal Sufficiency Of Plaintiff's Sherman Act § 1 Case And Proposed Proof Of Vertical Conspiracy ("Defendant's Motion"), having come on for hearing before the Court in a pretrial conference pursuant to Fed. R. Civ. P. 16, and the Court having considered the memoranda and other papers filed by the parties and the factual record previously submitted by Atlantic Richfield Company ("Atlantic Richfield") in support of its motion for partial summary judgment, and having heard oral argument,

IT IS HEREBY ORDERED that Defendant's Motion be granted as set forth below:

Uncontroverted Facts Concerning The Relevant Market And Likelihood of Monopolization

1. The facts set forth below in paragraphs 2 to 4 have been established without substantial controversy and shall therefore be deemed established for all purposes in this action pursuant to Fed. R. Civ. P. 56(d).

2. The "discount segment of gasoline marketing," as alleged to exist in paragraphs 14, 15 and 19 of the First Amended Complaint, does not exist as a separate and distinct product market for antitrust purposes. As set forth more fully in paragraphs 2(a)-(e) below, major-brand and minor-brand gasoline retailers compete with each other in the same market.

a. Consumers can use major-brand and minor-brand gasolines reasonably interchangeably because generally applicable government and industry specifications essentially standardize the chemical characteristics affecting gasoline quality and performance.

b. Major and independent refiners and marketers freely buy, sell and exchange gasoline among each other.

c. The prices of major-brand and minor-brand gasoline exhibit patterns of closely parallel movement. These highly correlated prices show that major-brand and minor-brand gasoline sales occur in a single market.

d. The alleged marketing practices of minor-brand sellers cited by plaintiff USA Petroleum Company ("USA") as placing them in a separate market — low prices, cash-only sales and self-service vendors — are also widely used by major-brand sellers.

e. Both Atlantic Richfield and USA recognized that major-brand and minor-brand stations compete in a single market by regularly surveying prices at both types of stations in setting their own prices.

3. The combined share of the relevant market held by Atlantic Richfield and other ARCO-brand gasoline sellers is clearly insufficient to present a dangerous probability of monopolization, particularly in light of the competition of other major oil companies. The ARCO-brand share of the retail gasoline market in California and Washington, the states in which USA contends it has been injured, has not exceeded 17 percent during the relevant period.

4. Even assuming *arguendo* that there exists a separate "discount" gasoline market, other major oil companies may enter this market, as USA contends that Atlantic Richfield did in April 1982, and the possibility of such entry effectively prevents Atlantic Richfield and other sellers of ARCO-brand gasoline from exercising monopoly power in that market regardless of their market share.

Legal Sufficiency Of Plaintiff USA's Sherman Act § 1 Case And Proposed Proof of Vertical Conspiracy

5. Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the "antitrust injury" requirement of Clayton Act § 4, without showing such prices to be predatory. Under the circumstances here concerned, as indicated in paragraphs 2 to 4 hereof, no such showing can be made. *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____ (December 9, 1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, et al.*, 475 U.S. ____

(March 26, 1986); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984). Count One therefore shall be, and hereby is, dismissed with prejudice.

Rule 54(b) Certification

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay and accordingly directs the entry of a final judgment dismissing the First Count of the Complaint, which pertains to the alleged violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

DATED: February 19, 1987.

WILLIAM P. GRAY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

USA PETROLEUM COMPANY,
Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

No. 87-5681
D.C. No. CV 83-3508-WPG

ORDER

Filed January 10, 1989

Before: ALARCON, NELSON and REINHARDT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

RULE 28.1 LIST OF PETITIONER'S NON-WHOLLY OWNED SUBSIDIARIES AND AFFILIATES

Agro Internacional, S. de R.L. de C.V.
Alyeska Pipeline Service Company
Arco Centennial Corp.
ARCO Channelview, Inc.
Arco Chemical Asia Pacific, Ltd.
ARCO Chemical Canada Inc.
ARCO Chemical China, Limited
Arco Chemical Company
ARCO Chemical Delaware Company
ARCO Chemical (Deutschland) GmbH
ARCO Chemical Espana Co.
Arco Chemical Europe, Inc.
Arco Chemical (Europe) Inc.
Arco Chemical Export Sales Company
Arco Chemical Foreign Sales Corporation
ARCO Chemical Indonesia, Inc.
ARCO Chemical Japan, Inc.
ARCO Chemical Korea, Inc.
ARCO Chemical Middle East, Inc.
ARCO Chemical New Zealand, Inc.
ARCO Chemical Overseas Services, Inc.
ARCO Chemical Pan America, Inc.
ARCO Chemical Products Europe, Inc.
ARCO Chemical (Singapore) PTE, Ltd.
ARCO Chemical Technology, Inc.
ARCO Chemical Texas, Inc.
ARCO Chemical (Thailand), Limited
ARCO Chemical Trading, Inc.
ARCO Chemie Nederland, Ltd.
ARCO Chimie France Corporation

ARCO Chimie France S.N.C.
ARCO France, Inc.
ARCO Idemitsu Corporation
ARCO/JSP Company
ARCO Lyondell, Inc.
ARCO Lyondell Licensing, Inc.
ARCO Mont Belvieu Corporation
ARCO Solar Nigeria, Ltd.
ARCO Synthesis, Inc.

Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited

Candel International, Limited
Colonial Pipeline Company
Compania Minera Dos Republicas S.A. de C.V.
Compania de Petroleo Ganso Azul. Ltda.
Cook Inlet Pipe Line Company
Curragh Coal Sales Co. Pty. Ltd.

Dixie Pipeline Company

East Texas Salt Water Disposal Co.
85819 Canada Limited
En ARCO Elastomers Company
En Arco Resins S.p.A.

Guasare Coal International N.V.

Iricon Agency Ltd.

Kenai Pipe Line Company
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company

Las Quintas Serenas Water Company
Logan Aluminum, Inc.
Lyondell Petrochemical Company

Nihon Oxirane Company, Ltd.
Nordfisk Mineselskab A/S
Northrop Incorporated

Oxirane Chemical Company
Oxirane Technology (Japan) Company

P.T. Gema Polytama Kimia
Platte Pipe Line Company

SHOWA ARCO Solar Far East PTG. LTD.
SHOWA ARCO Solar K.K.

Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } SS.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 7, 1989, I served the foregoing PETITION FOR WRIT OF CERTIORARI OF ATLANTIC RICHFIELD COMPANY on respondent in this action by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Maxwell M. Blecher
Blecher & Collins
611 West Sixth Street
Suite 2800
Los Angeles, California 90017

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 1989, at Los Angeles, California.

J. Gordon Hooper

J. GORDON HOOPER